



# Center for Biological Diversity

*protecting and restoring natural ecosystems and imperiled species through  
science, education, policy and environmental law*

VIA FACSIMILE and CERTIFIED MAIL

June 1, 2004

Chief, Marine Mammal Conservation Division  
Attn: ZMRG  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910  
Fax: 301-427-2516

RE: Comments on Proposed Rulemaking for the Definition of the MMPA's Zero Mortality Rate Goal (69 Fed. Reg. 23477).

Dear Sir or Madam:

On behalf of the Center for Biological Diversity and the Turtle Island Restoration Network, I submit the following comments regarding the Proposed Rulemaking for the Definition of the MMPA's Zero Mortality Rate Goal ("ZMRG"). 69 Fed. Reg. 23477. First and foremost, while we may not entirely agree with NMFS's proposed definition, we support NMFS's efforts to define ZMRG. While we believe that the ZMRG threshold as currently determined in the annual Stock Assessment Reports ("SARs") (i.e. 10% of PBR) is legally enforceable, it is preferable to have the term defined by regulation. In drafting these comments, we interpret this proposed rulemaking as limited to defining ZMRG as used in Sections 101(a)(2) and 118 of the MMPA. We do not see this rulemaking as having any bearing on the implementation of the International Dolphin Conservation Program (MMPA Sections 301 through 307).

In the Advanced Notice of Proposed Rulemaking ("ANPR"), 68 Fed. Reg. 40888, NMFS framed the process of determining whether or not commercial fisheries have attained ZMRG as a two part inquiry. First NMFS would seek to determine (or define) an "insignificance threshold" ( $T_{ins}$ ) for a given stock; second NMFS would consider whether, when reducing mortality and serious injury below  $T_{ins}$  would not be "within the feasible economics" of the fishery, if NMFS could still declare a given fishery at ZMRG. As discussed below, we believe that this is an improper way to frame the issue. Mortality and serious injury to marine mammal stocks must not only reach "insignificant levels" ( $T_{ins}$ ), they must also "approach zero." Further, the statute clearly requires that fisheries "shall" reach ZMRG by April 30, 2001; such a command leaves no room for consideration of the "feasible economics" of a given fishery. In contrast to the ANPR, the proposed rule seems to have appropriately moved the analysis of the "feasible economic" of the fishery to the Take Reduction Team ("TRT") process rather than the initial determination of whether ZMRG has been reached by the fishery. While we believe this is an improvement upon the approach outlined in the ANPR, we remain concerned that the current

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proposal fails to include "approaching zero" within its definition of ZMRG.

### Legal Significance of ZMRG

The MMPA mentions ZMRG in several places (e.g. Sections 101(a)(2), 118(a)(1), 118(b), 118(f)(2)). The most explicit command regarding ZMRG is at Section 118(b)(1):

Commercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after [April 30, 1994].

This command is unequivocal. Courts have repeatedly held that "shall means shall." See Brower, et al. v. Evans, et al., 257 F.3d 1058, 1068 n.5 (9<sup>th</sup> Cir. 2001)(MMPA case holding use of the term "shall" has mandatory effect: "'Shall' means shall." Center for Biological Diversity v. Norton, 254 F.3d 833, 2001 (9<sup>th</sup> Cir. 2001) (quoting Forest Guardians v. Babbitt, 174 F.3d 1178, 1187-88 (10<sup>th</sup> Cir. 1999)); see also United States v. Monsanto, 491 U.S. 600, 607, 105 L. Ed. 2d 512, 109 S. Ct. 2657 (1989) ("by using 'shall' 'Congress could not have chosen stronger words to express its intent that forfeiture be mandatory'").

Despite this clear command from Congress, in the ANPR, NMFS stated that "a first option would be to accept the statement in MMPA section 118(b)(1) that fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate." This is not just one "option" among several that NMFS can "accept." This is the unambiguous command of the statute. NMFS simply cannot rewrite the statute via regulation or policy to turn a "shall" into a "may." NMFS's second "option" in which a fishery could be declared at ZMRG even if it exceeded  $T_{ins}$  is not an option at all; Section 118(b)(1) requires all fisheries to reduce mortalities to "insignificant levels." To define ZMRG such that mortality and serious injury to a marine mammal stock could exceed "insignificant levels" would directly conflict with the statute and would therefore likely be struck down by a reviewing court. NMFS of course is required to take the economics of a fishery and available technologies into account in figuring out how to reduce mortality and serious injury to insignificant levels, but NMFS cannot use these factors as an excuse not to reach such levels.<sup>1</sup> While the proposed rule seems to reject this patently illegal "option" from further consideration, any reinclusion of this provision into the final definition would render the rule invalid.

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<sup>1</sup>In the event NMFS considers economic and technical feasibility in its determination of whether a given fishery has reached ZMRG, NMFS can in no instance claim that reducing mortality and serious injury below  $T_{ins}$  is not feasible for a given fishery if NMFS has never even convened a take reduction team for that fishery. As it currently stands, several Category I and most Category II fisheries are not subject to an operative take reduction plan. Similarly, allowable mortality and serious injury under such a scenario could never be greater than current rates (or rates in 1994 when the MMPA Amendments were enacted) as such rates are by definition feasible.

## Defining "Insignificant Levels"

In the ANPR, NMFS proposed three options for defining  $T_{ins}$ : 1) 10% of PBR; 2) 10% delay in recovery; and 3) 0.1%  $N_{min}$  (cetaceans) and 0.3%  $N_{min}$  (pinnipeds). In the proposed rule, NMFS chooses Option 1 to define an "insignificance threshold." As mentioned above the MMPA requires not just "insignificant levels" of mortality and serious injury to marine mammal stocks, but also that such take be at rates "approaching zero." Nowhere in the proposed rule does NMFS attempt to include the "approaching zero" requirement into the proposed definition of ZMRG. As such, the proposed definition is inadequate as a matter of law. A similar unlawful regulatory construction of the MMPA was recently struck down by a court. See NRDC v. Evans, 232 F.Supp.2d 1003, 1023 (N.D. Cal 2002) (holding NMFS regulation at 50 C.F.R. § 216.103 facially invalid as it conflates separate statutory requirements of MMPA Section 101(a)(5) for permit issuance of "small numbers" and "negligible impact" into a single requirement).

In fact, the proposed rule does not actually define ZMRG; rather it defines a wholly different concept - an "insignificance threshold." Putting aside for a moment the failure to address the "approaching zero" prong of ZMRG, NMFS's choice of Option 1 (10% of PBR) is the preferable option for defining  $T_{ins}$  as it is the only option that is compatible with various other statutory and regulatory provisions of the MMPA. As noted in the ANPR, Option 1 also has the advantage of being familiar to NMFS's continuants as it is the same as the proposed definition of ZMRG in the initial NMFS rulemaking to implement the 1994 amendments to the MMPA. (60 Fed. Reg. 31666). It is also the current de facto definition of ZMRG used in the SARs. Additionally, and most importantly, it is tied to the statutory defined role of PBR. Section 118(f)(2) makes the "short-term goal" of a take reduction plan ("TRP") to reduce mortality and serious injury of a marine mammal stock to below PBR within six months, and the "long-term goal" of the TRP to reduce such take to ZMRG within five years. Defining ZMRG (or at least  $T_{ins}$ ) in relation to PBR is most compatible with this statutory scheme. Moreover, if  $T_{ins}$  is defined as 10% of PBR, the effectiveness of a TRP in reaching  $T_{ins}$  is easy to measure; once the TRP reduces mortality and serious injury to below PBR within the first six months of the TRP's operation, a further 10% reduction in mortality and serious injury over each successive six month period will reduce such take to 10% of PBR over the five-year life of the plan (i.e. mortality and serious injury is at or below 90% of PBR after the first year of the TRP, 70% of PBR after the second year of the TRP, 50% of PBR after year three, 30% of PBR after year four, and 10% of PBR after year five.)<sup>2</sup>

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<sup>2</sup>The five-year timeframe from the adoption of a TRP to the reaching of ZMRG comes from Section 118(f)(2). The only way to read this provision in harmony with the provision at Section 118(b)(1) for all fisheries to have reached ZMRG by April 30, 2001 is that the five-year step-down reduction in take under a TRP was to have been completed by April 30, 2001 (i.e. started no later than April 30, 1996). However, since NMFS missed most of the statutory deadlines for implementing TRPs, and for many fisheries has yet to initiate the TRP process, compliance with the April 30, 2001 deadline is now impossible. The appropriate remedy for NMFS's (and numerous fisheries') failure to reach ZMRG by the Congressional deadline is beyond the scope of this letter but we do not agree with NMFS's statement that "a fishery would not be closed under the

In the ANPR, NMFS claimed that a downside of Option 1 is that it leads to “overly conservative levels of protection for certain endangered species.” This is hardly a downside. Given NMFS’s obligations under Section 2(c) and 7(a)(1) of the ESA to “conserve” listed species, and the Supreme Court’s admonition that endangered species are to be afforded the “the highest of priorities.” T.V.A. v. Hill, 437 U.S. 153, 174 (1978), an endangered species can never be deemed to have too much protection. Moreover, the MMPA is replete with provisions requiring ESA-listed species to receive additional protection. See e.g. Sections 3(1)(C), 3(19)(B)&(C), 101(a)(5)(E), 118(d)(4)(A). By tying  $T_{ins}$  to PBR, endangered and threatened species get the additional protection they deserve under the MMPA. Eliminating this would run counter to both the ESA and the MMPA.

In our comment on the ANPR, we described why we believe Options 2 and 3 considered by NMFS are unlawful. As these options are no longer being considered by NMFS we will not repeat those comments here. In sum, while we believe that NMFS’s current proposal may be an appropriate definition for “insignificant levels,” we do not believe that  $T_{ins}$  is the same as ZMRG. A complete definition of ZMRG must also incorporate the “approaching zero” language of the statute.

### Defining “Approaching Zero”

As repeatedly mentioned above, the MMPA requires not only that fisheries reduce incidental mortality and serious injury of marine mammals to “insignificant levels,” but also that such injury and mortality be reduced to a rate “approaching zero.” Section 118(b)(1). The MMPA is concerned not only with marine mammal populations, but also with the health and welfare of individual marine mammals. As such, the MMPA not only seeks to reduce mortality and serious injury of marine mammals to biologically insignificant levels, but also to reduce such mortality in absolute terms. In this context, the “insignificant levels” prong of ZMRG may be interpreted as protecting marine mammal populations, while the “approaching zero” prong is read as protecting individual marine mammals by reducing mortality and serious injury to the lowest possible levels.

In many instances, particularly with stocks with relatively large populations,  $T_{ins}$  may be a very large number. For example, using a  $T_{ins}$  of 10% of PBR, 549 Western North Atlantic harbor seals, 833 California sea lions, 366 short-beaked common dolphins, 157 Dall’s porpoise, and 1,616 Northern fur seals, plus many hundreds of other marine mammals, could be killed on an annual basis without exceeding  $T_{ins}$ .<sup>3</sup> If NMFS ignores the “approaching zero” prong of ZMRG and simply equates  $T_{ins}$  with ZMRG, up to 5621 marine mammals could lawfully be killed each year by fisheries in the United States.<sup>4</sup> Such a large number is nowhere near “approaching zero.”

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ZMRG simply because its incidental mortality and serious injury rate was above the target level at the deadline.”

<sup>3</sup>These numbers come from the Draft 2003 SARs.

<sup>4</sup>This number is derived by summing 10% of the PBR of each marine mammal stock for which a PBR is calculated in the Draft 2003 SARs. Since PBR is not calculated

There are several different ways that NMFS can define the "approaching zero" prong of ZMRG. The simplest one would be an actual numerical cap on mortalities and serious injuries. Such a cap to be true to the phrase "approaching zero" would have to be a very low number (i.e. <10). For stocks where  $T_{ins}$  is greater than the cap, fisheries would have to reduce mortalities and serious injuries to the level of the cap to be considered at ZMRG. Similarly, in those cases where  $T_{ins}$  is lower than the cap, fisheries would have to reduce mortality and serious injury to  $T_{ins}$  or below to reach ZMRG. Additionally, the use of the word "approaching" in the statutory language implies movement. In other words, the "approaching zero" prong of ZMRG is not static; it would be ratcheted down closer to zero with each successive year until an actual zero mortality and serious injury rate were achieved. We would support such an approach.

An alternative method by which NMFS could institute the "approaching zero" prong of ZMRG would be to define it as a rate in relation to some other variable. The key of course is choosing the right rate and the right variable. The MMPA ascribes ZMRG to both fisheries and marine mammal stocks. Compare Sections 118(b)(1) and (2), ascribing the ZMRG mandate to specific fisheries, with Sections 118(f)(1) and (2), which ascribe take reduction and ZMRG in terms of specific marine mammal stocks. While the "insignificant levels" prong of ZMRG can only be determined in relation to the status of a given stock, the "approaching zero" prong can be interpreted as applying to either or both of fisheries and marine mammal stocks. In other words, "approaching zero" could be defined as a function of PBR (assuming it were a small enough percentage as to actually "approach zero."), or alternatively, it could be defined in terms related purely to a given fishery (e.g. being a function of the number of vessels in a given fishery or fishing effort). Perhaps the best way to define it is to use a method similar to that already used by NMFS in the categorization of fisheries for the annual List of Fisheries. In the List of Fisheries, NMFS uses a two-tiered analysis to categorize fisheries. In the first-tier analysis, NMFS sums up the mortality and serious and serious injury to a given marine mammal stock, to determine if such impact is greater than 10% of PBR. This analysis is comparable to an "insignificant levels" analysis. If such take exceeds 10% of PBR, NMFS moves on to a tier-two analysis. However, if such take is below 10% of PBR, each fishery is classified as Category III and that is the end of the analysis. NMFS's tier-two analysis determines whether or not each individual fishery's annual incidental mortality and serious injury exceeds 1% of PBR, and if so, the fishery is classified as Category I or II depending on the levels of take. Because the threshold of tier-two analysis is so low (1% of PBR) this analysis could be considered to comply with the "approaching zero" prong of ZMRG. However, to comply with the ZMRG requirement that mortality and serious injury be both at "insignificant levels" and "approaching zero," NMFS's would have to carry out tier-two analysis on all fisheries, including those classified as Category III by tier-one analysis, to determine if mortality and serious injury exceeds

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for many stocks given uncertainties in population sizes for such stocks, the total allowable annual mortality and serious injury under this interpretation of ZMRG would actually be far greater than the 5621 animals calculated. For example, an official PBR is not calculated for the harp seal based on uncertainties of the size of the population in U.S. waters. However, using the Canadian "PBR" gives a  $T_{ins}$  of 15,600. Adding this to the total  $T_{ins}$  for other stocks gives a total allowable annual kill of over 20,000 individuals.

1% of PBR (i.e. approaches zero). In other word, even if the impacts on a given marine mammal stock of all fisheries combined was below  $T_{ins}$  (i.e. insignificant levels), a fishery would not be at ZMRG unless it also individually was responsible for annual mortality and serious injury of no more than 1% of PBR. Such an analysis would be straightforward to carry out, and fully implement the requirements of ZMRG.<sup>5</sup>

In sum, we believe that ZMRG should be defined by regulation such that it has the full mandatory legal effects contemplated by Section 118(b)(1) of the MMPA. The economic and technical feasibility of a given fishery reducing its incidental mortality and serious injury to insignificant levels approaching zero should not be considered in determining if ZMRG has been reached for that fishery. In defining ZMRG, NMFS must give full effect to both portions of the statutory command; mortality and serious injury should be reduced to "insignificant levels," and mortality and serious injury should also be reduced to a rate "approaching zero." An appropriate definition of "insignificant levels" is a combined annual rate of mortality and serious injury from all fisheries of less than 10% of PBR for each marine mammal stock. An appropriate definition of "approaching zero" would be a very low numerical cap (<10) of combined annual mortality and serious injury from all fisheries for each marine mammal stock. Alternatively, "approaching zero" could be defined as the annual rate of mortality and serious injury from each fishery being less than 1% of PBR for each marine mammal stock. In either case, both the "insignificant levels" and "approaching zero" criteria would have to be met before NMFS could consider any fishery to have reached ZMRG.

Finally, we have concerns with NMFS's proposed definition in that it leaves considerable discretion in the hands of the Assistant Administrator in straying from a simple mathematical calculation of the "insignificance threshold." So long as this discretion is limited to making changes in the default PBR variables based on better scientific data, we believe such flexibility may be lawful. However, if this provision is used to miscategorize a fishery's attainment of ZMRG based on political or other non-scientific factors, we believe it would be unlawful. In any event, any deviation from the default values in the determination of whether a fishery has reached ZMRG would be an agency action triggering compliance with NEPA and the ESA.


Thank you for the opportunity to comment. We look forward to shortly seeing a final rule defining ZMRG that properly incorporates or adequately responds to the suggestions raised in this

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<sup>5</sup>If NMFS adopts such a two tiered approach to determining if ZMRG is reached, fisheries currently classified as Category III which have mortality and serious injury rates between 1-10% of PBR should be reclassified as Category I or II. This would require a change in the regulations at 50 C.F.R. § 229.2. Such a regulatory change may also be required to fully implement the MMPA. Since Section 118(f) does not contemplate take reduction plans for Category II fisheries that take non-strategic stocks at levels greater than ZMRG, a regulatory change that would harmonize these sections would be to redefine Category I fisheries to include all fisheries with take levels above ZMRG. This would be entirely consistent with the statutory scheme and regulatory intent and would provide a mechanism for all fisheries to reach ZMRG.

comment letter and otherwise complies with the MMPA and the ESA and all other applicable law. If you have any questions please do not hesitate to contact me at the address and phone number listed in the letterhead.

Sincerely,



Brendan Cummings,  
Attorney, CBD